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No. 08-221

Supreme Court, U.S.
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In The
Supreme Court of the United States

MEADOWLAKE CORPORATION, et al.,

Petitioners,

v.

STATE OF OHIO, ex rel. NANCY ROGERS,
ATTORNEY GENERAL OF OHIO,

Respondents.

On Petition For Writ Of Certiorari
To The Ohio Supreme Court

REPLY TO THE STATE OF OHIO, EX REL. NANCY ROGERS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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REPLY TO THE STATE OF OHIO, EX REL. NANCY ROGERS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

In its Response to Petitioners, Meadowlake Corporation, et al.'s ("Meadowlake") Petition for Writ of Certiorari, Respondent, The State of Ohio, ex rel. Nancy Rogers ("Ohio") lists three reasons why this Court should deny Meadowlake's request. Ohio argues that the Excessive Fines Clause does not apply to the civil penalty imposed upon Meadowlake by the Ohio Environmental Protection Agency; that, even if it did apply, the fine in this case was not excessive; and that, in essence, Meadowlake's due process rights were in no way violated by the trial court in this matter. Meadowlake will address each of Ohio's arguments in reverse order.

I. THE DENIAL OF MEADOWLAKE'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In its Response to Meadowlake's contention that this case presents significant questions with respect to the denial of Meadowlake's due process rights under the Fourteenth Amendment to the United States Constitution, Ohio argues the merits of its case and ignores the issue which Meadowlake requests that this Court consider. Meadowlake had a Sixth Amendment ***right*** to counsel that was denied by the trial court.

As stated in Meadowlake's Petition, the case at the trial court level was of a quasi-criminal nature, and the Sixth Amendment right to counsel clearly extends to quasi-criminal matters. Meadowlake, therefore, had a Sixth Amendment right to counsel at the trial court level. When the trial court denied Meadowlake the opportunity to secure new counsel prior to an evidentiary hearing and denied Meadowlake's request for a continuance, the trial court violated Meadowlake's Sixth Amendment rights by, essentially, forcing Meadowlake to proceed to trial unrepresented. The violation of Meadowlake's Sixth Amendment rights are, in turn, a violation of its right to due process as guaranteed by the Fourteenth Amendment.

II. THE EXCESSIVENESS OF THE FINE.

Ohio also argues that, even were this Court to grant Meadowlake's Petition and hear this case, this Court would hold that the fine was not excessive. Again, Ohio spends a considerable portion of its Response arguing the merits of a case that has not even been accepted by the Court and ignores the issues which Meadowlake requests this Court to consider.

This Court has clearly stated that, when judging excessiveness under the Excessive Fines Clause, the touchstone inquiry is proportionality of the fine to the offense for which the fine is imposed. Ohio argues that the fine imposed upon Meadowlake is not

disproportional to the offense for which it was imposed. The State then proceeds to argue the merits of its case. However, Meadowlake submits that there are numerous other factors to consider than simply those listed by Ohio, all of which are meant to be set forth in a brief on the merits. For example, there is Meadowlake's inability to pay the $300,000.00 fine imposed upon it; the fact that Meadowlake did not cause anywhere near $300,000.00 of damage to the State of Ohio; or the fact that Meadowlake in no way profited by this amount through its alleged violative conduct.

The issue which Meadowlake wants this Court to resolve, however, is what analysis lower courts should utilize when considering the excessiveness of fines under the Eighth Amendment. Ohio attempts to argue that the lower courts are clear about what analysis to use because, in three of five cases cited by Meadowlake, the courts used a gross proportionality test. However, and seemingly in support of Meadowlake's argument, Ohio notes that each of the three courts arrived at their conclusion by using ***different*** factors.

Even though they both used a gross proportionality test, the court in *U.S. ex rel. Tyson v. Amerigroup Illinois, Inc.*, 488 F.Supp.2d 719 (N.D. Ill. 2007), considered different factors than the court in *Towers v. City of Chicago*, 173 F.3d 619 (7th Cir. 1999). In fact, the *Towers* court considered four factors that are not even mentioned in this Courts opinion in *U.S. v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d (1998). And, as set forth in Meadowlake's

Petition, the court's analysis in *U.S. v. Nevada Power Company*, 1990 WL 149660 (D. Nev. June 1, 1990), differs from both *Towers* and *Tyson*.

Ohio then notes that, in the other two cases cited by Meadowlake, the courts held fines to be appropriate so long as they were levied under a particular statutory scheme. See generally *Newell Recycling Company, Inc. v. U.S. Environmental Protection Agency*, 231 F.3d 204 (5th Cir. 2000) and *Kelly v. U.S. Environmental Protection Agency*, 203 F.3d 519 (7th Cir. 2000). Implicit in Ohio's argument is that, as long as the statute which imposes the fine contemplates the amount levied, then this Court is left without any recourse should an excessive fine be levied. This is counterintuitive of our government's system of checks and balances.

As set forth in Meadowlake's Petition, lower courts could employ several methods for analyzing a fine under the Excessive Fines Clause: the *Bajakajian* factors; the *Tyson* factors; the *Towers* factors; or the *Nevada Power* factors. Or, it can avoid the analysis altogether, abdicate its role in the system of checks and balances, and hold that, as long as Congress says it is okay, the fine cannot be excessive. See *Newell* and *Kelly*. These courts may all use a gross proportionality test, but they may also arrive at their conclusions through disparate analysis.[1] Of course,

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[1] Meadowlake reminds the Court of its argument with respect to the U.S. EPA's Civil Penalty Policy as found in the

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this assumes that a lower court even analyzes a civil fine under the Excessive Fines Clause at all, which is at the heart of Meadowlake's Petition.

III. THE APPLICATION OF THE EXCESSIVE FINES CLAUSE TO CIVIL FINES.

Finally, the State of Ohio argues that, because this Court has never applied the Excessive Fines Clause to a civil fine, the Excessive Fines Clause must not apply to civil fines. If the State's circular logic is stretched to its absurd limits, this Court may not have ever issued an opinion in any case. Regardless, the State's argument, in some ways, supports Meadowlake's contention that this case presents a novel issue for the Court to consider.

Ohio begins its argument by stating that this Court has never applied the Excessive Fines Clause to a civil fine. However, the corollary is also true, i.e. this Court has never held that the Excessive Fines Clause does ***not*** apply to a civil fine. The State's arguments begs the very question on which Meadowlake seeks this Court to rule: whether the excessiveness of a civil fine falls under the purview of the Eighth Amendment.

As more fully set forth in Meadowlake's Petition, the need for clarity begins with this Court's opinions

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Clean Water Act, 22 U.S.C. §309(d), as more fully set forth in Meadowlake's Petition. Of the six factors to be considered under the Policy, only one is mentioned in *Bajakajian*.

in *Austin v. U.S.*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) and *Bajakajian*, *supra*. In *Bajakajian*, this Court basically held that, if a fine is remedial in nature, the Excessive Fines Clause does not apply and, if it is punitive in nature, then it does. This Court then rejected the United States' argument that 18 U.S.C. §982(a)(1) was remedial in nature and, thus, not subject to the Excessive Fines Clause.

In *Austin*, this Court stated that the determinative question is not whether a forfeiture is civil or criminal but whether the forfeiture is a monetary punishment. Because a fine may serve more than one purpose, the fact that a forfeiture serves both remedial goals and punitive goals will not exclude it from analysis under the Excessive Fines Clause.

As noted in Meadowlake's Petition, Justice Kennedy alluded to these conflicting opinions in his dissent in *Bajakajian*. He stated that "the majority treats many fines as 'remedial' penalties even though they far exceed the harm suffered . . . In the majority's universe, a fine is not a punishment even if it is much larger than the money owed. This confuses whether a fine is excessive with whether it is a punishment." *Bajakajian*, *supra,* at 345. Most importantly, Justice Kennedy noted that the danger here is that the Court "appears to remove important classes of fines from any excessiveness inquiry at all." *Id.* at 344.[2]

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[2] Meadowlake directs this Court's attention to the 8th Circuit Court of Appeals' decision in *U.S. v. Lippert*, 148 F.3d

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Ohio argues extensively that the fines imposed by the EPA are civil in nature and not criminal. Yet, this ignores the critical inquiry of whether or not the fine is meant to punish. Certainly, it cannot be argued that every civil fine imposed by state or Federal law escapes Eighth Amendment analysis simply because a state legislature or Congress labels the fine as civil in nature. As this Court stated in *Austin*: "Thus, the question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment." *Austin*, *supra* at 610. As Justice Kennedy stated, an entire group of fines would be left out of constitutional inquiry simply as labeling them as civil in nature.

The State of Ohio imposed a $300,000.00 fine upon Meadowlake. This fine did not represent a reimbursement to Ohio for damage caused by Meadowlake, and it did not represent a disgorgement of profits. In no way was this fine remedial. Under any analysis, how could this fine be considered anything other than punishment. As such, its excessiveness, if any, deserves consideration under the Eighth Amendment. A fine can punish something other than criminal activity especially when it is not connected to actual damages or improperly obtained profits.

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974 (1998), where the court noted a "strong conflicting signal" from *Bajakajian*. *Id.* at 978. The court further stated that, with respect to the issue of whether the Excessive Fines Clause applies to Anti-Kickback Act civil penalties, "we are not certain how the Supreme Court will resolve it." *Id.*

As set forth more fully in Meadowlake's Petition, this case presents the opportunity for the Court to end the confusion over whether the potential excessiveness of a civil, administrative fine can be analyzed under the Excessive Fines Clause. This Court can answer whether the Eighth Amendment applies to purely punitive fines or whether it applies to fines that are both punitive and remedial in nature. More importantly, it can speak as to whether and how civil fines are analyzed at all.

CONCLUSION

Based upon the foregoing and the reasons stated within Meadowlake's Petition, Petitioners, Meadowlake Corporation and Meadowlake Limited, LLC respectfully request the Court to grant its petition for *certiorari*.

Respectfully submitted,

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